

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF A
DEPARTMENT OF ECOLOGY ORDER
CANCELLING A PERMIT GRANTED
TO QUENTIN H. ELLIS and
MARIAN HUNTER TO APPROPRIATE
PUBLIC SURFACE WATER,

QUENTIN H. ELLIS and
MARIAN HUNTER,

Appellants,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB No. 82-190

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER

This matter, the appeal of a Department of Ecology order
cancelling a permit to appropriate public surface waters, came on for
hearing before the Pollution Control Hearings Board, Gayle Rothrock,
Chairman, David Akana and Lawrence J. Faulk, Members, convened at
Lacey, Washington, on October 10, 1983. Administrative Law Judge
William A. Harrison presided. Respondent elected a formal hearing

1 pursuant to RCW 43.21B.230.

2 Appellant Quentin H. Ellis appeared and represented himself.
3 Respondent appeared by Patricia Hickey O'Brien, Assistant Attorney
4 General. Reporter Bibi Carter reported the proceedings.

5 Witnesses were sworn and testified. The exhibits were examined.
6 From testimony heard and exhibits examined, the Pollution Control
7 Hearings Board makes these

8 FINDINGS OF FACT

9 I

10 Appellants, Quentin H. Ellis and Marian Hunter, applied to the
11 State Department of Ecology (DOE) to appropriate public surface waters
12 from two springs on their land in Stevens County. This application,
13 made November 9, 1977, sought an appropriation for domestic supply. A
14 permit was granted by DOE on August 10, 1978.

15 II

16 The permit granted by DOE required construction for the
17 appropriation to begin by October 1, 1979. When construction did not
18 begin, DOE extended the time to October 1, 1980. When construction
19 still did not begin, DOE extended the time further to October 1,
20 1981. When construction even then did not begin, DOE extended the
21 time yet again to October 1, 1982. When it appeared to DOE that
22 appellants would not meet the latest extension, and after opportunity
23 for the appellants' to show cause, DOE cancelled the permit by Order
24 of October 18, 1982.

25
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1 III

2 Appellants do not reside on the land in question. Mr. Ellis and
3 his sister, Ms. Hunter, reside in Renton. Their grandfather
4 homesteaded 160 acres of the 280-acre site in the early 1900's. That
5 homestead encompassed the location of the two springs.

6 IV

7 The land has not been actively lived upon since the late 1940's.
8 The land is currently used only for timber growing. The surface water
9 flowing from the two springs is used only by free-roaming livestock
10 and wildlife.

11 V

12 Appellants state that such rights to divert the surface water as
13 may have been acquired by their grandfather were not claimed by the
14 filing procedure set forth in chapter 90.14 RCW, Water Rights -
15 Registration - Waiver and Relinquishment, Etc.

16 VI

17 Appellants stipulate that they have not begun construction of any
18 means for appropriating water for domestic use. They stipulate that
19 the permits and extensions have allowed enough time to do so.
20 Appellants state that they have no plans for any development on the
21 site at this time.

22 VII

23 The gravamen of appellants' appeal is that they are entitled to
24 the permit in question because of the origin of the surface water on
25 their land or because of a right to divert acquired at the time the

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1 land was homesteaded.

2 VIII

3 There does not appear to be any water shortage in the area where
4 this case arises.

5 IX

6 Any Conclusion of Law which is deemed a Finding of Fact is hereby
7 adopted as such.

8 From these Findings the Board comes to these

9 CONCLUSIONS OF LAW

10 I

11 Any right to divert the surface water which may have been acquired
12 by appellants' grandfather at the time of homestead is not before us
13 for review.¹ Such a right pre-dates the Water Code of 1917, chapter
14 90.03 RCW, whereas we are now reviewing the cancellation of a permit
15 issued under that 1917 Code.

16 II

17 The Water of Code of 1917 declares:

18 ...Subject to existing rights all waters within the
19 state belong to the public, and any right thereto, or
20 to the use thereof, shall be hereafter acquired only
21 by appropriation for a beneficial use and in the
22 manner provided and not otherwise; and, as between
23 appropriations, the first in time shall be the first
24 in right... RCW 90.03.010 (Emphasis added.)

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- 25 1. This right could, conceivably, come before us for review or could
26 be reviewed by the Superior Court in a general adjudication of
27 water rights (See RCW 90.03.110-.240). In either case the use (or
non-use) of such right and failure to file a claim for it will
bear upon the rights' continued existence. RCW 90.14.'60 and
90.14.071.

1 The origin of the surface water on appellants' land does not entitle
2 them to the permit in question which was granted under the 1917 Code.

3 III

4 The Water Code of 1917 further declares, with regard to permits to
5 appropriate public water and their cancellation:

6 90.03.320 Appropriation procedure--Construction
7 work. Actual construction work shall be commenced on
8 any project for which permit has been granted within
9 such reasonable time as shall be prescribed by the
10 supervisor of water resources, and shall thereafter
11 be prosecuted with diligence and completed within the
12 time prescribed by the supervisor. The supervisor,
13 in fixing the time for the commencement of the work,
14 or for the completion thereof and the application of
15 the water to the beneficial use prescribed in the
16 permit, shall take into consideration the cost and
17 magnitude of the project and the engineering and
18 physical features to be encountered, and shall allow
19 such time as shall be reasonable and just under the
20 conditions then existing, having due regard for the
21 public welfare and public interests affected: and,
22 for good cause shown, he shall extend the time or
23 times fixed as aforesaid, and shall grant such
24 further period or periods as may be reasonable
25 necessary, having due regard to the good faith of the
26 applicant and the public interests affected. If the
27 terms of the permit or extension thereof, are not
complied with the supervisor shall give notice by
registered mail that such permit will be canceled
unless the holders thereof shall show cause within
sixty days why the same should not be so canceled.
If cause be not shown, said permit shall be canceled.

20 A further extension would go beyond the time necessary to develop the
21 stated use. Instead, it would serve as affirmation of appellants'
22 right to the public water in question, for domestic purposes, without
23 any present plans to use it for such. This is at direct variance with
24 the policy of the 1917 Code that any right for the use of such water
25

1 be acquired only by appropriation, and is hence contrary to the public
2 interest and violative of RCW 90.03.320. The cancellation of this
3 permit by DOE should be affirmed.

4 IV

5 Should appellants' wish to possess a permit to appropriate the
6 water in question there are several alternatives. Among these are to
7 apply for a permit for stock watering or wildlife maintenance, or any
8 other beneficial use as set forth at RCW 90.54.010. Such permits will
9 be limited, however, to the amount of water necessary for such uses.
10 See RCW 90.03.290. Appellants could also reapply for a domestic
11 permit when plans for a domestic use are actually made. Appellants
12 speculate that if they wait to reapply for a domestic permit, others
13 will apply first and obtain earlier priority. That is possible. Yet,
14 the strict rule of the 1917 Water Code that first in time is first in
15 right may not apply, depending entirely on the circumstances. The
16 Water Resources Act of 1971, Chapter 90.54 RCW, requires allocation of
17 waters among potential users based upon securing maximum net
18 benefits. RCW 90.54.020(2). Adequate and safe supplies of water
19 shall be preserved and protected in potable conditions to satisfy
20 human domestic needs. RCW 90.54.020(4). These principles could,
21 depending on circumstances, uphold a future domestic use by appellants
22 over an earlier non-domestic use. Such a determination cannot be made
23 while appellants plan for human use of the water remains evanescent,
24 unclear, and wraith-like.

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

From these conclusions the Board enters this

ORDER

The Department of Ecology Order cancelling appellants' permit to appropriate public surface water (Permit No. S3-25728P) is hereby affirmed.

DONE at Lacey, Washington, this 7th day of November, 1983.

POLLUTION CONTROL HEARINGS BOARD

Gayle Rothrock
GAYLE ROTHROCK, Chairman

David Akana
DAVID AKANA, Lawyer Member

See Dissenting Opinion
LAWRENCE J. FAULK, Member

William A. Harrison
WILLIAM A. HARRISON
Administrative Law Judge

1 DISSENTING OPINION

2
3 In 1967, the Legislature adopted SB 175 having to do with water
4 rights (RCW 90.14).

5 In RCW 90.14, the words "without sufficient cause" are used to
6 describe the circumstances when a water right can be relinquished.
7 The Senate Journal on February 24, 1967 recounts the debate concerning
8 this section of the law. Senator Guess made the comment that "If a
9 person could give sufficient cause for failing to use the water than
10 this would be taken into account." Senator Hallauer, in answer to a
11 question, said, "If there are adequate waters, there would be no
12 problem."

13 It is obvious that Legislation dealing with water rights is
14 designed not only to make water available to the public for
15 appropriate use and to protect it from being wasted; but just as
16 importantly to preserve and protect the water rights of our citizens.
17 It seems to me that is the point Senators Guess and Hallauer were
18 trying to make in 1967.

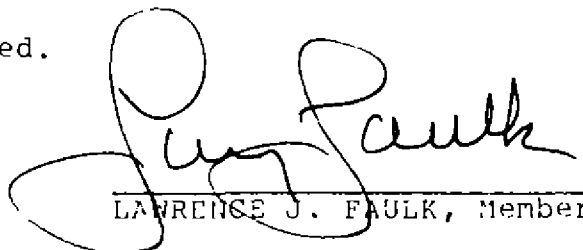
19 There is no evidence in this matter that any person is being
20 denied access to a supply of water because of the existence of
21 appellant's surface water permit. There also is no evidence that the
22 maintenance of appellant's surface water permit is resulting in any
23 injury or damage of any vested or existing right or rights under
24 permits for this water.
25
26

1 The source of this water are two springs originating on
2 appellant's property which was homesteaded by his grandfather prior to
3 1917. There does not appear to be any water shortage in this area.
4 Abandonment or non use of water is no longer the basis for cancelling
5 a permit having been eliminated by the Legislature in 1967.

6 The Department of Ecology has authority to extend a permit beyond
7 any term initially established for actual appropriation. I believe
8 DOE should allow the appellant the use of the water until and if a
9 subsequent application is made, which if granted, would preclude the
10 continuance of appellant's permit because of the quantity of water
11 available for appropriation.

12 The appellant was honest enough to indicate he did not intend to
13 use the water, but he did not want to loose it. This seem reasonable
14 to me in that there is water available and nobody else has a need for
15 it.

16 Be that as it may, I think we, as a Board, have a duty to
17 interpret and apply the statutes in a manner that furthers justice,
18 and therefore I believe the Department of Ecology Order of
19 Cancellation should be reversed.

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21 
22 LAWRENCE J. FAULK, Member
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24
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